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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 2nd MEETING

Held at the Austria Center Vienna,
on Wednesday, 3 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

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The meeting was called to order at 2.40 p.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 1 (a) (continued) (A/CONF.152/C.1/L.6, L.19, L.23)

1. Mr. RAMBERG (Observer, International Maritime Committee) called attention to the use of the term "rules of law" in the Commission's draft (A/CONF.152/5). It was his understanding that a contractual clause such as the "Himalaya clause", extending to stevedores the protection given to the carrier, would not amount to a "rule of law" as referred to in the second sentence of subparagraph (a), and thus stevedoring services would not be excluded from the Convention. On the other hand, a State party to the Convention that had ratified the Hague-Visby or the Hamburg Rules or the Multimodal Transport Convention would be subject to provisions of those Conventions appending certain benefits to independent contractors, such as stevedoring services. Where a stevedoring company was covered by such provisions, it would not be clear to what extent the second sentence of subparagraph (a) applied to it.

2. Referring to article 15 of the draft, he pointed out that even if, at the present stage of the discussion, persons who were covered by rules of law governing carriage were excluded from the projected Convention by article 1 (a), they might "re-enter" coverage by the Convention through the application of article 15 if they were found covered by provisions of the Conventions he had mentioned.

3. Mr. SWEENEY (United States of America) remarked that the Hamburg Rules and the Hague-Visby Rules protected the carrier and his "agents or servants". Because of potential coverage under other provisions of law, stevedores did not consider themselves to be either agents or servants, nor did they wish to be so classified. In the drafting of both the Hamburg Rules and the Visby amendments, an attempt had been made to define the independent contractor as including stevedores; in both cases, that attempt had failed, and as a consequence the independent contractor was protected by neither set of rules.

4. It was his impression that in the discussion the Committee had lost sight of the fact that the draft Convention was a non-carriage convention surrounded, as it were, by carriage conventions containing gaps which it proposed to remedy. Stevedores, he insisted, were not carriers, although they might seek some of the benefits accruing from that status.

5. Mr. HERBER (Germany) submitted that the phrase "responsible for the goods under applicable rules of law governing carriage" could pose problems of interpretation as far as the definition of the term "applicable rules" was concerned. In the interests of producing a clear text, and in the belief that there was a general understanding of what was signified by the term "carrier", he suggested the following wording, which was a shortened version of the Japanese proposal (A/CONF.152/C.1/L.19), for the second sentence of article 1 (a): "However, a person shall not be considered an operator whenever he is a carrier." His delegation considered the Japanese delegation's reference to multimodal transport operators to be superfluous, since they were obviously carriers, but he would not object to its inclusion.

6. Ms. JØRGENSEN (Denmark) found the Commission's text quite adequate. She urged that, because the matters under consideration were of great importance, all proposals for amending the Commission's text should be submitted in writing and be fully substantiated. She asked what would be the position under the Convention as drafted of entities which did not describe themselves as stevedores but which performed stevedoring functions.

7. Mr. FILIPOVIĆ (Yugoslavia) remarked that it had long been his country's experience, when attempting to cater specifically for the concerns of stevedores in legislation on maritime and inland navigation, that stevedores tended to seek limited liability and other statutory benefits but declined attendant responsibilities. With regard to the German oral proposal, one effect of its adoption would probably be to reopen the debate concerning the meaning of the term "carrier". He believed that the Convention should define that term. His preference was for the Commission's text.

8. Mr. BONELL (Italy) said that while the German oral proposal seemed at first sight to have the merit of clarity, it might well prove on closer scrutiny to produce uncertainty. Like the previous speaker, he feared that its adoption would raise the question of what was meant by the term "carrier". He believed that the Japanese proposal might be approved in principle, subject to the Committee's later decision with regard to liability limits, following which it might be reviewed.

9. Miss VAN DER HORST (Netherlands), noting the absence of support for the proposal submitted by her delegation for the second sentence of article 1 (a) (A/CONF.152/C.1/L.23), withdrew it in favour of the oral proposal by Germany, which her Government would interpret as implying that a carrier who had goods in his charge before the carriage began or after it had ended would not be considered as a terminal operator for the purposes of the draft Convention.

10. Mr. LARSEN (United States of America) said that his delegation could endorse the German oral proposal as best reflecting the clear distinction between carrier and non-carrier functions.

11. Mr. WALL (United Kingdom) endorsed the German oral proposal. Moreover, it removed the risk of confusion produced by the use of the terms "take in charge goods" and "responsible for the goods" in one and the same article.

12. Mr. LAVIÑA (Philippines) also approved the German oral proposal, while sharing the views expressed by the representatives of Yugoslavia and Italy.

13. The CHAIRMAN invited the Committee to vote on the German oral proposal for the second sentence of article 1 (a).

14. The proposal was adopted by 15 votes to 3.

15. In reply to a question by Mr. FILIPOVIĆ (Yugoslavia), the CHAIRMAN said that in accordance with rule 36 of the rules of procedure, States which abstained from voting were to be considered as not voting. For that reason, he had not called on those abstaining to declare themselves.

16. Mr. LAVIÑA (Philippines) felt that a count should be taken of the number of abstainers, since that seemed to be the intention of the rules of procedure.

17. Mr. BONELL (Italy) suggested that the Drafting Committee might be asked to formulate the second sentence of subparagraph (a) somewhat more elegantly, perhaps by reference to the preliminary draft convention on the subject prepared by the International Institute for the Unification of Private International Law (UNIDROIT).

18. Mr. HERBER (Germany) said he was not opposed to the Drafting Committee making cosmetic changes, but warned against the Committee referring to it questions with substantive connotations. Since the First Committee had adopted his delegation's oral proposal for the second sentence of article 1 (a), it withdrew the proposal for that sentence in paragraph 2 of document A/CONF.152/C.1/L.6.

19. Mr. LEBEDEV (Union of Soviet Socialist Republics) considered the Italian suggestion well founded. His delegation had abstained from voting on the German oral proposal because it found the Commission's text adequate to meet the definition requirement posed by the representative of Yugoslavia.

20. Mr. ZHAO Chengbi (China) agreed with the representative of Italy. His delegation had abstained in the vote on the German oral proposal because the meaning of the term "carrier" was unclear. It had to be defined because its interpretation varied from one legal system to another.

21. Mr. WALL (United Kingdom) suggested that delegations wishing to make improvements to the text of the second sentence of subparagraph (a) should consult informally and present an agreed text to the Committee. He pointed out that the Drafting Committee was not supposed to deal with substantive issues.

22. Mr. RUSTAND (Sweden) said that with the adoption of the German oral proposal a definition of the term "carrier" was urgently needed.

23. The CHAIRMAN said that the definition of the term "carrier" might be discussed later on the basis of written proposals.

24. He said that if there was no objection, he would take it that the Committee approved the text of article 1 (a) reproduced in document A/CONF.152/5, as amended orally by Germany, for referral to the Drafting Committee.

25. It was so decided.

Article 1 (b) (A/CONF.152/C.1/L.4)

26. Mr. LARSEN (United States of America) introduced his delegation's proposal for subparagraph (b) (A/CONF/152/C.1/L.4). He said that the draft Convention dealt with the transport of goods, not with the means of transporting them. Goods packed in containers should be covered by the Convention, but empty containers in storage yards, or in trucks and railroad cars, should not. It was necessary to make that clear.

27. Mr. HERBER (Germany) thought it was best not to make exceptions. Containers which were handled or carried as cargo should be treated under the terms of the Convention; compensation should therefore be payable for empty containers which were damaged in transit. The proposal would make an unwarranted exception for certain kinds of terminal operators.

28. Mr. LAVIÑA (Philippines) agreed. It was already clear that the goods covered by the Commission's draft included goods packed in containers, but not empty containers.

29. Mr. WALL (United Kingdom) preferred subparagraph (b) as it stood. There would be some inconsistency in adding a reference to storage yards for empty containers in subparagraph (b) when geographical distinctions of that kind had been rejected for subparagraph (a).

30. Mr. ROMAN (Belgium) observed that operators accepted packed containers without inspecting their contents. If goods were damaged while in transit, it would be difficult for the operator to prove that he was not liable.

31. Mr. OCHIAI (Japan) said that the United States proposal would raise difficulties with regard to the application of article 10 (3). It would be uncertain whether an operator who met the cost of repairs to empty containers could exercise the right of retention provided by that article.

32. The CHAIRMAN said that the Committee's understanding was that the term "goods" did not exclude empty containers, such as containers returning to their starting point after unloading.

33. Mr. BONELL (Italy) and Ms. JORGENSEN (Denmark) opposed the United States proposal.

34. Mr. LARSEN (United States of America) noted the difference of views in the Committee as to whether empty containers in storage yards were goods for the purposes of the draft Convention. His own delegation's view was that they were not.

35. The CHAIRMAN said that if there were no objection, he would take it that the Committee approved the text of article 1 (b) as it stood, for referral to the Drafting Committee.

36. It was so decided.

Article 1 (c) (A/CONF.152/C.1/L.6, L.23)

37. The CHAIRMAN said that the Committee need not consider the proposal by Germany to amend subparagraph (c) (A/CONF.152/C.1/L.6, para. 3) since it was simply consequential upon its proposal for the first sentence of subparagraph (a), which had been withdrawn.

38. Miss VAN DER HORST (Netherlands), referring to her delegation's proposal for article 1 (c) in document A/CONF.152/C.1/L.23, said that its purpose was to make it clear that the international carriage of the goods took place according to one contract only. Consignments carried between two domestic points and awaiting carriage abroad under a second contract would be excluded.

39. The CHAIRMAN recalled that the word "identified" had been included in the Commission's draft for that very reason, namely that the operator must be able to verify, by glancing at the goods, whether they were intended for international carriage. He should not be required to consult the contract of carriage.

40. Mr. FILIPOVIĆ (Yugoslavia) endorsed the principle underlying the Netherlands proposal. It was at the initial stage, the stage when the contract or documents were drawn up, that the intention of international carriage was created. In some cases the goods might not actually be carried to their destination - for instance, they might be stolen in transit.

41. Mr. WALL (United Kingdom) objected to the Netherlands proposal. A reference to the contract of carriage would make it impossible for the operator to ascertain whether he was liable for the goods.

42. Mr. SCHROCK (Germany) agreed that it would be problematic to include in the draft a reference to the contract as such, since the scope of the contract was not verifiable by the operator by means of any documents or markings on the goods. In paragraph 2 of its written comments on the draft (A/CONF.152/7) his Government had argued that purely domestic legs of segmented international transport, if identified as being subject to individual domestic contracts, should not be governed by the Convention. His delegation could accept subparagraph (c) as it stood.

43. Mr. HORNBY (Canada) objected to the exclusion of domestic segments from the scope of the Convention. There should be one rule to cover all transport, to be determined by the ultimate destination and to cover both combined transport operations and segmented contracts. He opposed the proposal of the Netherlands delegation, whose interpretation of subparagraph (c) differed from that of the German delegation.

44. Mr. LARSEN (United States of America) also opposed the Netherlands proposal. Including a reference to the contract would raise undue complications.

45. Mr. LAVIÑA (Philippines) agreed. However, the present wording of subparagraph (c) was awkward and called for stylistic improvement.

46. Miss VAN DER HORST (Netherlands) withdrew her delegation's proposal.

47. Mr. ZHAO Chengbi (China) said that the consideration of article 1 (c) led his delegation to question whether the title of the draft Convention was appropriate. Its views on that subject were set out in its written comments (A/CONF.152/7/Add.2). The title of the Convention should be amended to read "Convention on the Liability of Operators of Transport Terminals in International Carriage of Goods". Transport in the international carriage of goods could be interpreted more widely than transport in international trade and would thus facilitate the application of the Convention to the transport of non-trade goods, such as goods for purposes of aid, exhibition and so forth, which accounted for a large part of international carriage of goods. During the discussion of article 1 of the draft Convention at the twenty-second session of the United Nations Commission on International Trade Law, most countries had taken the view that the term "goods", as used in the Convention, included non-trade goods. The task of regulating the international transport of goods was covered by many conventions, but there was no convention covering transport terminals and it was appropriate for that gap to be filled. The title proposed by China would be appropriate for the purpose.

48. The CHAIRMAN said that, although the content of article 1 (c) was related to the title of the Convention, it would be necessary to consider the sum of all its articles in order to be sure that the international carriage element prevailed over that of international trade. He felt it would be wiser to take up that question after all the substantive articles of the draft had been examined. He therefore suggested that consideration of the Chinese proposal for the title of the Convention should be deferred.

49. Mr. ZHAO Chengbi (China) agreed.

50. Mr. SCHROCK (Germany) said that his delegation's proposal for an additional sentence in article 1 (A/CONF.152/C.1/L.6, para. 4) was relevant to the discussion of article 1 (c). The proposal had emerged from discussions held with the operators of transport terminals concerned not with maritime carriage but with carriage by rail or road. According to draft article 1 (c), carriage was to be considered as international if the places of departure and destination of the goods were identified as being located in two different States. The transport documents which accompanied goods in such a situation would constitute a decisive aid towards such identification. His delegation therefore believed that it would be helpful if the Convention stipulated that the use of international transport documents such as CMR or CIM documents constituted a presumption of international carriage and that the use of national transport documents implied the opposite. His delegation now recognized that the proposal set forth a legal rule which did not perhaps fit systematically into article 1. It was ready, therefore, to leave a decision on its place in the Convention either to the First Committee or to the Drafting Committee. It nevertheless wished to submit the substance of its proposal to the Committee for consideration.

51. Mr. FILIPOVIĆ (Yugoslavia) supported the German proposals.

52. Mr. MUTZ (Observer, International Organization for Railway Transport) agreed with the idea in the first part of the proposal, namely that the existence of an international transport document should give rise to a presumption of international carriage, on the ground that it would facilitate the implementation of the Convention. He had difficulty in endorsing the second part, which might enable the operator of a transport terminal to escape liability under the Convention.

53. Mr. HORNBY (Canada) said that the presumption of international carriage must be rebuttable. To say that goods accompanied by a domestic transport document should be deemed not to be involved in international carriage would offer operators of transport terminals an opportunity to escape liability. The choice of document should be only one factor in determining whether carriage was or was not international. If it was made clear that the presumption was rebuttable, he could support the German proposal.

54. Mr. WALL (United Kingdom) said that he had considerable sympathy for the German proposal. Anything which would help the terminal operator to identify his liability under the Convention constituted a benefit. The method suggested, however, was only one of a number of ways in which that could be done. The proposed addition might not be appropriate in article 1 and a better location could perhaps be found for it. While it should not constitute an exclusive rule it could be regarded as a helpful step forward.

55. Mr. SWEENEY (United States of America) said that he was satisfied with article 1 (c) as it stood. One immediate difficulty which his delegation had with the German proposal was that transport documents were frequently not identified as domestic or international. A bill of lading, for example, was simply a bill of lading. Road and rail services in and between the United States, Mexico and Canada did not use the documents prescribed in the international conventions, and the transport documents which were employed did not identify themselves as being national or international. Moreover, the requirement that an international transport document should be "known to the operator" placed an impossible burden of proof on shippers. He agreed with the Canadian representative that the presumption must be rebuttable, but the difficulty could be removed entirely by deleting the clause "which is known to the operator" from both parts of the German proposal.

(Mr. Sweeney, United States of America)

The highly subjective nature of that element of proof would thus be eliminated. In his view, however, the proposal as a whole was made unnecessary by the objective test constituted by article 1 (c) as it stood.

56. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the idea behind the German proposal, of making the distinction between international and domestic carriage more readily apparent, was attractive, but spelling it out in the Convention posed serious problems. The distinction between international and domestic documents was uncertain. Documents established by international organizations and labelled as such were also used domestically, particularly in the framework of multimodal transport. To consider such carriage as international merely because the document used bore a stamp reflecting its international origin could be quite risky, particularly for large countries. Moreover, the very concept of a "document" was so broad and complex that its introduction into the article could lead to additional difficulties. The question whether carriage was or was not international should be governed by the criterion set out in article 1 (c), without the introduction of any additional test, nor should such a test be included as an independent article or paragraph in some other part of the Convention. To do that would merely make its implementation more complicated.

57. Mr. LAVIÑA (Philippines) said that he too felt that the German proposal would complicate the issue. What made carriage international was the fact that it took place between two different States. Using as a test documents which were not readily identifiable would only lead to more complications. Article 1 (c) set forth a valid and logical rule and should remain as it was.

58. Mr. WALL (United Kingdom) said that his delegation was generally content with the definition in article 1 (c) as it stood. However, it was important that a terminal operator should be given a clear indication that he was taking in charge goods that carried with them a liability to which the Convention applied. While he could accept some of the arguments concerning the subjective language of the proposed addition, he felt that the use of the words "are identified" in the original wording already introduced a subjective element. The Convention should include some indication of how that identification was to be carried out. Some form of document or notice should have to be delivered to the terminal operator to give him clear notice that he could be liable under the Convention for the goods in question. The point was important and his delegation was therefore ready to support the German proposal, though perhaps not as a part of article 1 or precisely in its present form. A terminal operator must be made well aware that he was accepting goods to which a liability would attach.

59. Mr. RUSTAND (Sweden) said that although some clarification of the provision in article 1 (c) might be necessary, he did not think it should be on the lines suggested in the German proposal. When the subparagraph referred to the identification of the place of destination of the goods it was not clear who was to make that identification. Presumably it would be done by the operator, or by his staff on his behalf, but that was not apparent from the text. He agreed with the point made by the representative of the United Kingdom that the transport document should be only one means of establishing that goods were to be taken abroad. Labelling and marking were other means. Regarding the question of notice to the operator raised by the the United Kingdom representative, he observed that the normal procedure was not for the documentation to be presented to the operator when the goods were delivered to the terminal but afterwards, when the owner of the goods collected them. One way of clarifying the meaning of the words "are

(Mr. Rustand, Sweden)

identified" would be to add after those words the words "or reasonably ought to have been identified". It would then be possible to apply the "reasonable man" test: for example, if the goods were clearly marked, a court would not accept a claim by the terminal operator that he had not identified them as being for international carriage and should therefore escape liability. If his oral proposal was not acceptable to the Committee, he was ready to accept the text as it stood.

60. Mr. SCHROCK (Germany) said that his delegation's intention was that the presumption of international carriage should be rebuttable. It withdrew the second half of its proposal. The first part of the proposal was not intended to detract from the substance of subparagraph (c), but merely to add something to cover the case of there being transport documents known to the operator which clearly indicated the international nature of the carriage, particularly where there might be false markings on boxes or containers.

61. Mr. ASTAPENKO (Byelorussian Soviet Socialist Republic) said that his delegation found subparagraph (c) entirely balanced. It endorsed the views of the United States and the Soviet Union that the text should remain as it stood. It shared the doubts expressed about the German proposal by other delegations, and particularly the views advanced by Sweden. It based its position on the Russian version of article 1 (c), which made it quite clear that the operator was the person who actually ascertained whether the carriage was international or not.

62. Mr. ZHAO Chengbi (China) said that his delegation could not support the German proposal because of the difficulty of distinguishing domestic carriage from international carriage, particularly by means of documentation. Also, the aim of the draft Convention was to lay down uniform rules. The Commitee should take care not to exclude too many cases lest the scope of the Convention became too limited. The Chinese delegation therefore approved subparagraph (c) as it stood.

63. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that his delegation also approved subparagraph (c) as it stood.

64. Mr. WALL (United Kingdom) referred to the point raised by the delegation of the Byelorussian Soviet Socialist Republic about who, according to the text of article 1 (c), ascertained whether the carriage was international. Having compared the English, French, Russian and Spanish versions, his delegation found that the former two gave a somewhat different interpretation from the latter.

65. The CHAIRMAN said that discrepancies of that nature could be left to the Drafting Committee to resolve.

66. He now intended to invite the Committee to vote on the first part of the German proposal in paragraph 4 of document A/CONF.152/C.1/L.6. When a vote had been taken earlier in the meeting, the Philippines delegation had suggested after the vote that abstentions should be counted. He wondered whether there was any support for that proposal, bearing in mind that the counting of abstentions was not provided for in the rules of procedure and that abstentions did not affect the result of the vote.

67. Mr. LAVIÑA (Philippines) observed that the practice throughout the United Nations system was that abstentions were counted. It was of course understood that they did not affect the result of the vote, but they did indicate the preferences of a proportion of participants.

68. The CHAIRMAN said that it had been pointed out by the Secretariat that abstentions had been counted on several occasions during the United Nations Conference on Contracts for the International Sale of Goods in 1980. They could consequently be counted at the present Conference.

69. Mr. HORNBY (Canada), speaking on a point of order, said that some delegations were clearly opposed to the first part of the German proposal and others had indicated that they could support it if it was amended. The German delegation had acknowledged that the intention of the first part of its proposal was that the presumption of international carriage was to be a rebuttable one, but some redrafting would be needed to make that clear. Consequently, if asked to vote on the first part of the German proposal as it stood, his delegation would have to oppose it, but it might be able to accept an amended formula. Given the difficulty of redrafting the proposal in the Committee, the Canadian delegation would be prepared to accept forthwith the principle contained in the first part of the German proposal on the understanding that it would be left to the Drafting Committee to ensure that it was worded in such a way as to reflect the notion of a rebuttable presumption.

70. The CHAIRMAN invited the German delegation to clarify the first part of its proposal along the lines advocated by the Canadian representative.

71. Mr. SCHROCK (Germany) said that, on the understanding that the Drafting Committee would improve the wording of the proposal and that the Committee would vote only on its substance, his delegation amended the first part of its proposal to read:

> "If the goods are accompanied by an international transport document which is known to the operator, it shall prima facie be presumed that such goods are involved in international carriage."

72. Mr. LAVIÑA (Philippines) said that his delegation considered that the revised proposal did not help to define international carriage. It preferred the text of subparagraph (c) as it stood. Furthermore, it could not agree to the idea that a text which had not been approved by the Committee should be passed to the Drafting Committee for consideration. That would violate rule 47 of the rules of procedure.

73. Mr. TARKO (Austria) said that his delegation did not understand what was meant by a prima facie presumption. It was satisfied with subparagraph (c) as it stood, particularly because of its objectivity and flexibility. If the Committee approved the revised German proposal, his delegation would ask for clarification of the notion of a prima facie presumption.

74. The CHAIRMAN observed that the term "prima facie" was the sort of formulation that could be reviewed by the Drafting Committee.

75. Mr. WALL (United Kingdom) said that his delegation opposed the revised proposal. It could, however, support one element of it and wished to inform the Committee that it was considering making a proposal for a different part of the draft Convention which would read:

> "If a document is presented to the terminal operator indicating that the goods are involved in international carriage, that should be regarded as prima facie evidence that the provisions of this Convention apply to such goods."

76. Mr. OCHIAI (Japan) said that his delegation could not support the revised wording suggested by Germany unless a clear definition of the term "international transport" was included in the Convention. In his view the expressions "international transport" and "international carriage" were tautological.

77. The CHAIRMAN invited the Committee to vote on the first part of the German proposal in paragraph 4 of document A/CONF.152/C.1/L.6 as orally amended by its sponsor, on the understanding that it would be left to the Drafting Committee to improve the wording where necessary.

78. The proposal was rejected by 25 votes to 5, with 1 abstention.

79. The CHAIRMAN said that if there was no objection, he would take it that the Committee approved the text of article 1 (c) as it stood, for referral to the Drafting Committee.

80. It was so decided.

The meeting rose at 5.30 p.m.